Supreme Court, U.S.
FILED

951877 MAY 13 1996

OFFICE OF THE CLERK

NO.: _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ALAN H. WILLIAMS, PETITIONER

v.

AIR WISCONSIN, INC., et al.,

RESPONDENTS

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

Gary R. Hershner
Virginia State Bar No. 19622
Counsel for Petitioner
MORRISSEY, HERSHNER & JACOBS
Seven South Adams Street
Richmond, Virginia 23220-5601
(804) 788-1956

## QUESTIONS PRESENTED

1. Where a whistle blower is discharged by an air line for whom he worked because he gave information damaging to the air line to the Federal Aviation Administration, can the Union representing the whistle blower simply put on a sham defense to the wrongful termination and satisfy its duty of fair representation to the employee?

2. Where a union rationalizes its failure to properly defend an employee's termination, does this preempt a jury question as to whether or not the union breached its duty of fair representation to the employee?

## LIST OF PARTIES

The parties to the proceedings below were the petitioner before this Court, Air Wisconsin, Inc., International Association of Machinists and Aerospace Workers and IAM Air Transport District 143.

## TABLE OF CONTENTS

QUESTIONS PRESENTED . . . . . i

LIST OF PARTIES . . . . . ii

TABLE OF CONTENTS . . . . . iii

TABLE OF AUTHORITIES . . . . . iv

OPINIONS BELOW . . . . . 2

JURISDICTION . . . . . 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED . . . . . 2

STATEMENT OF CASE . . . . . 3

REASONS FOR GRANTING THE WRIT . 16

CONCLUSION . . . . . 28

APPENDIX . . . . . A-1

## EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

## TABLE OF AUTHORITIES

Cases — Page

Black v. Ryder,
15 F.3d 573 (6th Cir. 1994) . . . . . 16, 22

Coates v. Johnson & Johnson,
756 F.2d 524 (7th Cir. 1985) . 27

Dement v. RF & P R. Co.,
845 F.2d 451 (4th Cir. 1988) . 21

Eaton Corp. v. Appliance Valves Corp.,
790 F.2d 874 (Fed. Cir. 1986) 26

Friends for All Children, Inc. v. Lockheed Aircraft Corp.,
587 F.Supp. 180 (D.D.C.) . . . 26

Geddes v. Chrysler Corporation
608 F.2d 261 (6th Cir. 1979) 27, 28

Glover v. St. Louis-San Francisco Railway Co.,
393 U.S. 324 (1969) . . . . . 27

Gumbs v. International Harvester, Inc.,
718 F.2d 88 (1983) . . . . . 27

International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979) . . . . . 21

Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348 (1986) . . . . . 18

Rakestraw v. United Airlines, Inc., 765 F.Supp. 747 (n.d. Ill. 1985) . . . . . 21

S.C. Johnson & Son, Inc. V. Lousiville & Nashville R. Co., 695 F.2d 253 (7th Cir. 1982) . 26

United States v. Esposito, 771 F.2d 283 (7th Cir. 1985) . 26

Valentino v. United States Postal Service, 674 F.2d 56 (D.C. Cir. 1982) . 27

Vick v. Texas Employment Comm'n., 514 F.2d 734, (5th Cir. 1975) . 26

Welsh v. United States, 844 F.2d 1239 (6th Cir. 1988) . 26

## Statutes

29 U.S.C. Sec. 411 . . . . . 2,3

29 U.S.C. Sec. 412 . . . . . 2,3

45 U.S.C. Sec. 151 to 188 . . . 2

NO.: _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ALAN H. WILLIAMS, PETITIONER

v.

AIR WISCONSIN, INC., et al.,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT FOR THE FOURTH CIRCUIT

Petitioner, Alan H. Williams (hereinafter "plaintiff"), by counsel, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in that Court on January 16, 1996.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unpublished and is reprinted in the Appendix. (App. A-1 to A-6). The Order denying the Petition With Suggestion For Rehearing In Banc is reprinted in the Appendix. (App. A-7 to A-8). The Order and Memorandum Opinion of the United States District Court for the Eastern District of Virginia is reprinted in the Appendix. (App. A-9 to A-39).

## JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 16, 1996. A timely Petition for Rehearing With Suggestion For Rehearing In Banc was filed in the Fourth Circuit Court of Appeals on January 30, 1996. Said Petition was denied on February 13, 1996. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. Sections 411 and 412 are set forth in the Appendix. (App. A-40 to A-44). 45 U.S.C. Sections 151 through 188 are set forth in the Appendix. (App. A-44 to A-122).

## STATEMENT OF THE CASE

This action was filed in the United States District Court for the Eastern District of Virginia, Richmond Division, against an employer, Air Wisconsin, Inc. (hereinafter referred to as "Air Wisconsin"), for the breach of a collective bargaining agreement and against International Association of Machinists & Aerospace Workers and IAMAW Air Transport, District 143 (hereinafter collectively referred to as "the Union"), a labor union for denial of fair representation pursuant to 29 U.S.C. Sections 411 and 412. Notwithstanding plaintiff's ample evidence, the Motions for Summary Judgment of the respondents were sustained.

The plaintiff was employed as a mechanic and inspector with Air Wisconsin from October, 1978 until he was terminated by Air Wisconsin in August, 1992. At all times relevant, plaintiff was a member of the Union. Plaintiff appealed his termination through the designated grievance procedure with Union assistance. This grievance procedure went all the way through arbitration where plaintiff lost. Plaintiff alleged in his action, that he was wrongfully terminated by Air Wisconsin and that accordingly Air Wisconsin breached the collective bargaining agreement with the Union.

Plaintiff further alleged that the Union acted arbitrarily, capriciously and in bad faith in representing him and therefore denied him his right to fair representation.

In the fall of 1991, Air Wisconsin was directing its personnel to release aircraft N430AW for service even though it knew it was unsafe. The plaintiff supplied critical evidence to the Federal Aviation Administration ("FAA") and otherwise assisted the FAA in its investigation to insure that the aircraft was grounded until it could be repaired and flown safely. As a result of the FAA investigation Air Wisconsin was given a large fine and two of its managers were suspended.

Plaintiff always enjoyed an exemplary record as an employee with Air Wisconsin. However, Air Wisconsin had an unwritten policy of getting rid of employees who reported safety problems to the FAA. The evidence shows that Air Wisconsin then plotted to get rid of plaintiff on trumped up charges. On August 6, 1992, plaintiff was terminated for an alleged abuse of the premium pay policy.

On July 5, 1992, the day of the supposed premium pay abuse, the plaintiff filled in the block on his pay card claiming premium pay to

which he was entitled if he was either a lead mechanic or if he performed inspector duties during the pertinent shifts. On August 4, 1992, towards the end of the day as he was getting off work, plaintiff was asked by a supervisor why he claimed premium pay on July 5, 1992. Plaintiff quickly responded in writing that he had performed inspector duties that day which entitled him to premium pay. As it turns out, the plaintiff was mistaken in his belief that he had performed inspector duties. However, plaintiff was still entitled to the premium pay he claimed, because he had been made lead mechanic. A mechanic is entitled to lead pay for a four hour block if he is made lead anytime during the four hour block. Plaintiff's work shift on July 5, 1992 began at 7:30 a.m. and would normally have ended at 3:30 p.m. Plaintiff was made lead mechanic during this shift. In addition, Plaintiff worked four hours of overtime that day, returning the beeper to Dale Hassenkamp, his supervisor, between 4:30 p.m. and 5:00 p.m., well into the extra four hour block of time, indicating that Plaintiff was still lead mechanic up until that time. Plaintiff would have been entitled to lead pay even if there was a lead mechanic on the

next shift. Plaintiff filed a grievance concerning his termination with the assistance of the Union. The matter eventually led to an arbitration hearing. Ron Anderson and Lonnie Sanders represented Plaintiff in preparation for and at the arbitration proceeding. During this time, Air Wisconsin and the Union were negotiating a new contract. In fact, Lonnie Sanders was a co-negotiator for the contract between Air Wisconsin and the Union.

At the arbitration hearing, Air Wisconsin gave a different "interpretation" of the collective bargaining agreement between it and the Union, than that "interpretation" offered by the Union. A key witness for Air Wisconsin was Giles Hieptas (hereinafter referred to "Hieptas"). The entire transcript of testimony covering the arbitration proceeding totalled a little over 400 pages. Approximately 121 pages contained the testimony of Hieptas. Hieptas was not impeached at all by the Union. Hieptas was never cross-examined on the fact that the Plaintiff was really terminated for being a whistle-blower. This is despite the fact that the Union representatives had been told by Manuel Carvalho ("Carvalho"), of the de facto policy told to him by,

among others, Hieptas, of getting rid of Air Wisconsin employees that cooperated with the FAA. This is notwithstanding the fact that Carvalho had reported this policy to the Union representatives and provided this information to the FAA with a clandestine tape recording of the discussion.

The thrust of the Plaintiff's defense at the arbitration proceeding should have been the fact that plaintiff was fired for being a whistle-blower. Yet no mention of this defense appears until late in the arbitration proceeding. Initially Ron Anderson ("Anderson"), who was the lead individual representing Plaintiff's defense, declined to give an opening statement until just before Plaintiff's evidence was to be presented. In the opening statement that Anderson finally gave, he made no mention of the fact that the Plaintiff was fired for being a whistle-blower. The only place in the arbitration record that the whistle-blower defense appears is in the testimony of the plaintiff himself. The Union presented no reasonable evidence that Air Wisconsin was motivated to lie and had a policy to terminate plaintiff because he was a whistle-blower. As correctly pointed out in the Union's memorandum, for what reason we do

not know, the arbitrator "expressly found that there was no evidence to support Williams' claim that he had been fired in retaliation for being a 'whistle-blower' to the FAA in 1991." The battle at the arbitration proceeding became a battle of documents and credibility of witnesses. The Union presented no evidence by which anyone could have inferred or concluded that Air Wisconsin would lie. Even as to the battle of documents, the Union's ill will was clear. The documents were available for the Union to review by August, 1992. Yet the Union did not even attempt to get the records until one week before the arbitration hearing was actually held in April, 1993. Timothy Regan ("Regan"), was called as a witness for the Union and was the individual who attempted to get the records for the Union. Regan stated that had the case gone on as planned in February, 1993, then the Union would have started the document search about two to three weeks before the hearing. However, in February the case was continued, at Plaintiff's insistence, two days before the hearing was to begin, when Plaintiff learned that the Union had not subpoenaed witnesses nor requested or reviewed any documents.

As a result of the Union's late

document request, work orders were not made available and Regan did not get what he requested. According to Regan the "paper chase" was intricate and required the actual viewing of work orders. Regan testified that the aircraft logs introduced into evidence by Air Wisconsin were incomplete and that there were other documents not made available.

Throughout the Union's defense of plaintiff, plaintiff requested that the Union question/speak with, among others, Manuel Carvalho, John Francissen and Gerry Martinez, the FAA inspectors, and Robert Wilcox. In fact the Union did speak with Manuel Carvalho who supplied the "smoking gun", the clandestine recording of Air Wisconsin executives articulating the policy of getting rid of whistle blowers. The Union never bothered to contact or discuss plaintiff's case with John Francissen and Gerry Martinez, who could have "put the icing on the cake", their discussion with an Air Wisconsin executive who confirmed the de facto policy of terminating whistle blowers. Likewise the Union never bothered to discuss with Robert Wilcox what evidence he could have provided and otherwise did not use, what should have been, very valuable testimony. Hieptas' credibility, which was deplorable,

was untouched at the arbitration proceeding.

In the case at bar, the appellees' discovery was limited to a discovery deposition of the plaintiff and document requests. That notwithstanding, in its opening memorandum, the Union stated that plaintiff "has failed to produce any evidence that the defendant union's conduct towards him was arbitrary, discriminatory, or in bad faith..." and that plaintiff "has not come forward with a single shred of evidence to suggest that the IAM's representation was short of exemplary." These statements were made in bad faith as plaintiff had no duty to provide any evidence until a Motion For Summary Judgment was filed. Similarly, in its Reply Memorandum to Plaintiff's Response to the Motions for Summary Judgment, Air Wisconsin stated, in bad faith, in a footnote, that "in a last gasp attempt to skirt the System Board's exclusive jurisdiction over his claim against Air Wisconsin, Williams alleges for the first time that there was 'collusion between Air Wisconsin and the Union' and that 'were conspiring against the plaintiff.' Before a Motion for Summary Judgment was filed, there was no reason for plaintiff to come forward with any evidence to prove his claim or theory. Plaintiff's

contentions and theories remained the same from the beginning of the case.

When plaintiff was requested to come forward with evidence, he provided dynamite evidence, including the statement of Carvalho, who had the "smoking gun" evidence about Air Wisconsin's de facto policies to terminate whistle blowers, and the statements of the FAA investigators, who were never contacted by the Union representatives and who could have put "the icing on the plaintiff's cake". Ronald Anderson, the Union representative who was supposed to have ably represented plaintiff at the arbitration proceedings signed a "Lying Larry" supplemental declaration where he acknowledged, for the first time, that he had in fact spoken with Carvalho and had not spoken with the FAA investigators. ("Lying Larry" is a colloquial character who when confronted with evidence/information that he has previously skirted, rationalizes this and punctuates the rationalization with the familiar phrase "that's the ticket".) Anderson likewise rationalized his failures as discussed infra.

In defending its apparent malfeasance/nonfeasance, the Union repeatedly touted Anderson's experience at arbitration

proceedings. The Union boasted that Anderson had handled over 100 grievance procedures. In his "Lying Larry" declaration, Anderson claimed discretion in not calling Carvalho as a witness because he claimed that Carvalho was not credible and would have appeared to have an ax to grind. In his supplemental declaration, Anderson also claimed, without explanation, that the FAA investigators would have had no evidence as to the reason why plaintiff was fired.

Interestingly enough in the supplemental declaration, Anderson claims that he had discussions with plaintiff and that at no time did Williams ever dispute his strategy. However, Anderson does acknowledge in paragraph five of the supplemental declaration that "Although Mr. Williams did tell us that he thought he had been fired because he went to the FAA on an earlier occasion, we had no believable evidence to support that charge." In fact, Anderson had the "smoking gun" evidence from Carvalho and would have had more evidence had he bothered to contact the FAA investigators.

While touting Anderson's experience, the Union and Air Wisconsin seek to have it both ways. Both the Union and Air Wisconsin attacked plaintiff because at his

discovery deposition, plaintiff was asked who he recommended should be subpoenaed. Plaintiff came up with a list of five witnesses, which did not include Carvalho or the FAA investigators. In his affidavit, plaintiff stated that he recommended that Anderson and the Union defense team contact, among others, Carvalho and the FAA investigators and left it to the Union, as his representative, (relying on Anderson's expertise), to determine whether or not to call the others as witnesses. Yet, the Union and Air Wisconsin now say that plaintiff should not have relied on Anderson's experience. Interestingly, in his "Lying Larry" declaration, Anderson admits having spoken to Carvalho. This must have been done at the suggestion of the plaintiff.

During the oral argument on the Motions for Summary Judgment, when the Union and Air Wisconsin tried to again rely upon plaintiff's statement taken out of context that he had listed five witnesses to be called, the court stated "that's not clear enough to put a nail in the coffin." The oral argument was heard on September 13, 1994 and the court enunciated from the bench, without articulation, that the Motions for Summary Judgment were sustained. Yet, the court's Memorandum Opinion was not entered

until January 20, 1995. In its Memorandum Opinion, while minimizing the plaintiff's evidence, the court cited with favor, plaintiff's "list of five individuals to be subpoenaed". The court also cited with favor that the Union was able to articulate justifiable reasons for not calling Carvalho or contacting the FAA investigators.

While the witnesses for Air Wisconsin at the arbitration were unimpeached, after Williams testified, he was thoroughly impeached by a host of witnesses. The first impeachment witness was that of Lonnie Sanders, an individual who was supposedly helping in plaintiff's defense. Sanders testified at the arbitration proceeding, on behalf of Air Wisconsin, that he was never told by Bert St. Louis that one of plaintiff's time cards had been tampered with and that he never advised plaintiff of this. Plaintiff had just testified to such conversations with Bert St. Louis and Sanders. Either Anderson did not bother to check with Sanders to make sure this evidence checked out, to assist his client's credibility, or plaintiff was set up by Anderson to sully his credibility.

Lisa Conover ("Conover"), was then called as a witness by Air

Wisconsin in reference to plaintiff being questioned about Required Items Inspection abuse (the falsification of time cards). Conover testified that plaintiff told her that "everybody does it". Conover went on to testify that Air Wisconsin decided to investigate other employees for time card falsification and discovered no other abuse. This clearly gave the arbitrator more reason to disbelieve the plaintiff and not Air Wisconsin witnesses.

Bert St. Louis was then called by Air Wisconsin and he testified that he never told anyone that there was time card falsification involving plaintiff's time cards. Plaintiff, of course, had testified to this on direct examination.

Dave Higginbotham then testified for Air Wisconsin and denied ever telling the plaintiff that he was ordered to fire him, again contradicting plaintiff.

Mike Hohman then testified that plaintiff told him that he was going to try and make as much money as he could at the cost of Air Wisconsin and that he bragged about it. By the end of all the evidence, plaintiff's credibility had been ruined, not withstanding the missing documents of Air Wisconsin. Air Wisconsin's credibility was unsullied.

## REASONS FOR GRANTING THE WRIT

Air Wisconsin is a nefarious company. For what airline is willing to put our children on its aircraft, knowing that aircraft is unsafe, that is not nefarious? The actions of Air Wisconsin define nefarious. Presumably not even "Lying Larry" can rationalize the actions of Air Wisconsin.

Plaintiff is a hero who supplied very valuable information that saved lives. Yet plaintiff has been repaid by being terminated from his job. Plaintiff was then denied his right to get his job back because of lack of fair representation by the Union. Plaintiff should be granted a writ because he has no other recourse. Further, if plaintiff is denied redress, then this will have a chilling effect on other people who would save the lives of children.

Furthermore, the Fourth Circuit Court of Appeals has entered a decision in conflict with a decision from another Circuit, that of Black v. Ryder, 15 F.3d 573 (6th Cir. 1994). This question of federal law should be settled by this Court. To date, the only case that has given any solace to a worker is the Black case.

That plaintiff has presented a proper case for a jury to consider can almost be shown by syllogism.

Air Wisconsin fires whistle blowers, those that provide information to the FAA leading to the grounding of Air Wisconsin aircraft. Plaintiff was a whistle-blower who worked for Air Wisconsin. It was known by Air Wisconsin that plaintiff provided information to the FAA that lead to the grounding of one of its aircraft, heavy fines and the suspension of two of its managers.

No evidence of Air Wisconsin's de facto policy to fire whistle-blowers was presented at the arbitration proceeding, other than the self serving statement of the plaintiff who was allowed to be thoroughly impeached by the Union's capricious, malicious handling of his defense. Air Wisconsin was not impeached by The Union notwithstanding the "smoking gun evidence" it had. Air Wisconsin had in fact fired plaintiff for being a whistle-blower. Air Wisconsin was allowed to prevail at arbitration because it contended that it relied on a review of documents, documents that were not available to the Union representative when he made a belated effort to review these documents. Normally an inference attaches, where there is missing evidence, that the evidence would have been unfavorable to the party that is charged with custody of the evidence. In the arbitration

proceedings, there was no reasonable evidence presented to challenge the veracity of the Air Wisconsin witnesses. Clearly the inference that could have been very strong as to the missing documents was of no value at all.

The Union represented its arbitrariness, capriciousness and bad faith by failing to interview key witnesses; by waiting until the 11th hour, and then only before the second time the arbitration hearing was scheduled, to attempt to review documents that had been supposedly available for eight months; and by setting up the plaintiff for impeachment by allowing him to testify knowing that Larry Sanders, a Union representative, would impeach him, and further by failing to otherwise impeach Air Wisconsin witnesses.

In deciding a Motion for Summary Judgment, the court is to view the underlying facts in the light most favorable to the non-moving party. Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348 (1986). In its Memorandum Opinion, the District Court did anything but view the evidence in the light most favorable to the plaintiff. As presented in the previous paragraphs, this case almost comes

down to a syllogism. Air Wisconsin is a nefarious company that fires whistle blowers. Plaintiff is a whistle blower. Plaintiff was fired by Air Wisconsin supposedly based on documents which were not produced to the Union in its belated effort to review these documents. Clearly, plaintiff was fired for being a whistle blower and no reasonable evidence of this was presented, despite its availability to the Union.

There is no mention of the nefarious nature of Air Wisconsin in the District Court's Memorandum Opinion. Acknowledgement of Air Wisconsin's nefariousness must be done in order to view the evidence in the light most favorable to the plaintiff. Rather the court cites in its statements of facts contained within the Memorandum Opinion, that Anderson and other Union representatives repeatedly requested that Air Wisconsin reinstate Williams during the grievance procedure. Evidence of these efforts is taken strictly from a statement by Anderson, referencing activity when plaintiff could not possibly have been present and is unable to deny. At the oral argument, the court accepted Anderson's "Lying Larry" declaration when Anderson contended that he did not call Carvalho as a witness

because he did not believe that Carvalho was credible. The court stated "I don't have any evidence that that's not his rational, do you?". To follow this rationale, would allow all criminal defendants to go free if they merely took the stand and claimed that they lacked scienter. Obviously courts have long held that criminal intent can be inferred by circumstantial evidence.

In the case at bar, the malevolence of Anderson and the Union can easily be shown by their malfeasance and nonfeasance; by their failure to call Carvalho as a witness; by their failure to even interview the FAA investigators; by their failure to interview witnesses that could have shown that Hietpas was a liar; by refusing to review the documents until the 11th hour, just prior to the second time the arbitration hearing was scheduled.

It is interesting to note that the court initially dismissed, as insignificant, plaintiff's testimony in his deposition that he had given the Union five witnesses that he recommended be subpoenaed, and that apparently all of these, except one, were subpoenaed, and the other witness testified on behalf of Air Wisconsin. In its final order, which took over four months to draft, the court ignored the other

evidence in the case and put the twist on the deposition testimony of plaintiff sought by the Union. In continuing to view the evidence in the light most favorable to the moving party, the court in its memorandum opinion cited with favor Ron Anderson's "Lying Larry" declaration where Anderson rationalized not calling Carvalho and not even contacting the FAA investigators. To show that the court viewed the evidence in the light most favorable to the appellees, the court also stated "moreover, an examination of the recently submitted testimony of the new witnesses established that Williams has failed to create a genuine issue of material fact that the Union breached its duty. This is because, in each instance, the Union has articulated legitimate reasons for its actions and Williams has not shown those reasons to be pretextual."

In the case at bar Plaintiff needs to prove that he was wrongfully terminated by Air Wisconsin and that the Union breached its duty of fair representation by conduct that was arbitrary, discriminatory and in bad faith. Dement v. RF & P R. Co., 845 F.2d 451 (4th Cir. 1988), International Brotherhood of Electrical Workers v. Foust, 442

U.S. 42 (1979), Rakestraw v. United Airlines, Inc., 765 F.Supp. 747 (n.d. Ill. 1985). Unfortunately there is very little case law to give guidance as to when there is a jury issue for cases like the one at bar. Most of the cases have been decidedly against the worker. However, one particular case, that of Black v. Ryder, 15 F.3d 573 (6th Cir. 1994), is very instructive.

In Black, another hybrid action, the disgruntled employee presented evidence that at the arbitration proceeding the Union's agent had never gone to the site where the accident was first discovered to investigate the incident nor to talk to any of the witnesses, particularly the witness who found the "alleged damage". The court in Black v. Ryder held that this evidence was sufficient to allow a jury to conclude that the grievance proceeding against him was the result of collusion between the Union and management, "that is, that the Union informed management that it wished to rid itself of a troublesome member, and that management obliged." Id. at 583. In Black the Plaintiff argued that the Union knew that the employer's primary evidence against him would be the written report of the mechanic who inspected the damaged truck and to neglect to interview

the mechanic amounted to "irrational behavior" on the Union's part. The court in Black ruled that this was sufficient evidence to allow a jury to decide the issues. Id.

Air Wisconsin's only effort to distinguish the Black case from the case at bar was because in Black, there was direct evidence of animosity between Black and the Union representative. Such a view is inaccurate and clearly tries to skirt around the key holdings in Black. However, the court likewise seemed to ignore the Black case because in the case at bar, there was no direct evidence of animosity between plaintiff and the Union. Such a position is absurd. This would mean that for the plaintiff to prevail, he would merely have had to say "I don't think they like me". Clearly the facts from which a person could infer malice (in the legal sense) are far more important than a party's perception that someone does not like him.

In the case at bar, plaintiff's case is far stronger than that offered by the Plaintiff in Black. The whole key to Plaintiff's defense was to show Air Wisconsin's prejudice because Plaintiff was a whistle-blower. Carvalho supplied the "smoking gun" and to not use the "smoking gun" was irrational and suggestive of collusion between Air

Wisconsin and the Union. To not investigate further and interview the FAA investigators and Robert Wilcox was likewise a denial of fair representation of Plaintiff. What could have been a very strong defense turned into a straw defense.

Ron Anderson's explanation that he did not call Carvalho as a witness because he did not find him credible and that Carvalho had an ax to grind simply does not wash. The only witness that the Union put on for the whistle-blowing defense was the plaintiff himself who obviously had a far greater ax to grind. Under traditional principals, the testimony of Carvalho and the FAA investigators would not have been merely cumulative. Evidence that is of a different kind or character is not cumulative. With plaintiff's bare naked statements he was shown to lack credibility. Carvalho would have been seen to be very credible with his supporting tape recording and the testimony of the two FAA investigators. John Francissen, one of the FAA investigators, could have testified to his clandestine meeting with Kevin Reinhalter, director of quality assurance for Air Wisconsin, who confirmed the de facto policy to terminate whistle-blowers.

From the beginning of the grievance procedure, plaintiff told

the Union representatives that he believed that he was being fired because he was a whistle-blower. He recommended several people to talk to concerning his defense and left this to the Union representatives. Specifically plaintiff wanted the Union to speak with the two FAA investigators, Carvalho and Roger Wilcox. The Union only spoke to one, Carvalho, who verified plaintiff's assertions. At the very least, it is a jury issue as to whether or not the failure to contact key witnesses, as per the Black case, shows arbitrariness, capriciousness and/or bad faith on the part of the Union. However, during the arbitration hearing, as pointed out by both appellees, there was no reasonable evidence to show that Air Wisconsin was motivated to terminate plaintiff because he was a whistle-blower.

A review of the Union's rationalization, that it was discretionary to pursue a mere documents production theory, supports plaintiff's position. The hearing was initially scheduled for February, 1993. Two days before the hearing, the plaintiff discovered that no documents had been reviewed, though they had been available since August, 1992. The hearing was then continued until late April, 1993. This gave the Union in excess of two

months to review these documents. The Union's document review began a week before the April hearing. Several documents, of course, were missing. This document review was only done at the insistence of the plaintiff. Without plaintiff's own persistence, the Union apparently would have done nothing towards plaintiff's defense. The fact that the Union begrudgingly did something at the 11th hour does not magically transform the representation from one of bad faith to one of good faith.

Generally speaking, when a party charged with custody of documents or items, no longer has them, then there is an inference that the evidence would have been unfavorable to the party charged with the custody of those documents. Depending upon the circumstances, that inference can be very strong. Accordingly, the courts very closely review the facts involved before evidence of "spoliation" is permitted. Welsh v. United States, 844 F.2d 1239 (6th Cir. 1988); S.C. Johnson & Son, Inc. V. Lousiville & Nashville R. Co., (7th Cir. 1982); Eaton Corp. v. Appliance Valves Corp., 790 F.2d 874 (Fed. Cir. 1986); United States v. Esposito, 771 F.2d 283 (7th Cir. 1985); Friends for All Children, Inc. v. Lockheed Aircraft Corp., 587 F.Supp.

180 (D.D.C.); Vick v. Texas Employment Comm'n., 514 F.2d 734, (5th Cir. 1975); Gumbs v. International Harvester, Inc., 718 F.2d 88 (1983); Valentino v. United States Postal Service, 674 F.2d 56 (D.C. Cir. 1982); Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985).

In the case at bar, the Union gave the arbitrator absolutely no reason to doubt the veracity of the Air Wisconsin witnesses. Air Wisconsin was not shown to be a nefarious company in the least.

Air Wisconsin and the Union had an additional defense to the action which actually aids the plaintiff. Respondents claimed that the plaintiff's suit should have been barred because of his failure to "exhaust internal Union remedies". Plaintiff did not pursue remedies within the Union after his failed arbitration. However, according to the Union Constitution such an "appeal", if successful, would have only resulted in disciplinary action against the Union officials involved. Respondents have acknowledged that the plaintiff is not required to exhaust Intra Union remedies where the remedies offered by the Union do not provide a reasonable possibility of providing the relief sought. Geddes v. Chrysler Corporation, 608 F.2nd 261

(6th Cir. 1979); Glover v. St. Louis - San Francisco Railway Co., 393 U.S. 324 (1969). In the case at bar the plaintiff is entitled to have his job back. The Union remedy, if a further "appeal" were successful, as articulated in the Union Constitution, was wholly unsatisfactory to remedy plaintiff's situation.

Notwithstanding the foregoing, the respondents have argued that "maybe" if the plaintiff had successfully appealed through the Union then Air Wisconsin would have given plaintiff his job back. The Geddes case completely destroys this ridiculous suggestion by the respondents by holding that such remedies must be known to the aggrieved employee before he is required to exhaust Union procedures. Geddes v. Chrysler Corporation supra.

The "maybe" articulated by the respondents is a far greater leap than any inference urged by the plaintiff.

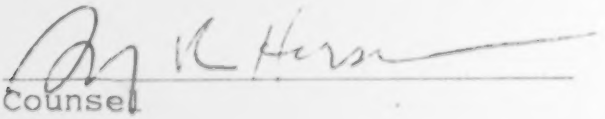
## CONCLUSION

The questions presented here are clearly of exceptional importance. The importance is not only for the plaintiff, but for all citizens. In viewing the evidence in the light most favorable to the appellant, which the District Court should have

done, it is clear that there is a jury issue as to whether or not Air Wisconsin wrongfully discharged the plaintiff; and as to whether or not the Union breached its duty in representing the appellant. In fact, the evidence is so compelling that a Motion for Summary Judgment on behalf of the appellant, because of the Union's absurd explanations as to why it did not call Manuel Carvalho, and its inexplicable failure to contact the FAA investigators, summary judgment on behalf of the plaintiff would be more appropriate. At the very least, there is a jury issue on these matters.

Respectfully Submitted,

**ALAN H. WILLIAMS**

By: 
Counsel

Gary R. Hershner
Virginia State Bar No. 19622
MORRISSEY, HERSHNER & JACOBS
Seven South Adams Street
Richmond, Virginia 23220-5601
(804) 788-1956

Counsel of Record for Petitioner

May 13, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

No. 95-1285

---

ALAN H. WILLIAMS,

Plaintiff-Appellant,

v.

AIR WISCONSIN, INCORPORATED; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE,' WORKERS; IAMAW AIR TRANSPORT, DISTRICT 143,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, District Judge. (CA-94-212)

Argued: December 4, 1995

Decided: January 16, 1996

Before HAMILTON, WILLIAMS, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Gary Raymond Hershner, MORRISSEY, HERSHNER & JACOBS, Richmond, Virginia, for Appellant. Debra Lynn Willen, GUERRIERI, EDMOND & CLAYMAN, Washington, D.C. for Appellees IAMAW and IAMAW Air Transport; Patricia H. Kim, O'MELVENY & MYERS, New York, New York, for Appellee Air Wisconsin. ON BRIEF: John A. FAlmond, GUERRIERI, EDMOND & CLAYMAN, Washington, D.C., for Appcllees IAMAW and IAMAW Air Transport; Michael A. Curley, O'MELVENY & MYERS, New York, New York, for Appellee Air Wisconsin.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Appellant, Alan H. Williams (Williams), appeals the district court's entry of summary judgment in favor of the appellees, Air Wisconsin, Inc. (Air Wisconsin),

International Association of Machinists and Aerospace Workers (IAM), anLL IAM Air Transport District 143 (District 143),* in an action alleging a breach of the collective bargaining agreement by Air Wisconsi@i and a breach of the duty of fair representation by the Union. Finding no error, we affirm.

I

On July 5, 1992, Williams, who was employed by Air Wisconsin as a mechanic, claimed twelve hours of premium pay on his time card. Air Wisconsin later investigated Williams' claim for twelve hours of premium pay because it suspected him of time card fraud. On August 6, 1992, after an initial charge hearing, Air Wisconsin terminated Williams.

After being discharged, William,,-. turned to the Union for help in regaining his job. The Union then filed a grievance on behalf of Williatns. After Air Wisconsin denied the grievance, the Union appealed the denial of Williams' grievance through the steps provided in the

*We will refer to IAM and District 143 collectively as the Union.

WILLIAMS v. AiR WISCONSIN, INCO@RATED

Collective bargaining agreement, and, while not required to do so, the Union ultimately took Williams' claim to arbitration.

While the Union was appealing Williams' grievance but before the arbitration hearing, the Union and Air Wisconsin were in the process of renegotiating the collective bargaining agreement. During these negotiations, the Union repeatedly requested Air Wisconsin to reinstate Williams, and Air Wisconsin agreed to conduct an independent investigation into Williams' fffing. This investigation showed that in a forty-five day period Williams had claimed 167.5 hours of unauthorized premium pay. Consequently, Air Wisconsin refused to reinstate Williams.

On April 28, 1993, Williams' grievance went to arbitration before a three-member panel. On October 4, 1993, Williams' grievance was denied. The panel found that Williams had abused the premium pay policy of Air Wisconsin from July 4 through July 8, and it reasoned that discharge was an appropriate sanction.

Williams then brought this action in the United States District Court for the Eastern District of Virginia. In the district court, Williams claimed that Air Wisconsin breached the collective bargaining agreement because it terminated him for reporting safety problems with Air Wisconsin's planes to the Federal Aviation Administration rather than for time card fraud. Williams also claimed that the Union breached its duty of fair representation by failing to call certain witnesses at the arbitration hearing who allegedly could have coffoborated his claim that Air Wisconsin fired him because he was a whistle-blower.

After holding a hearing on Williams' claims, the district court granted summary judgment in favor of the Union, holding that the Union did not breach its duty of fair representation to Williams.

Because die Union did not breach its duty of fair representation to Williams, the district court granted Air Wisconsin's motion for summary judgment, holding that it lacked the authority to reconsider the decision of the

arbitration panel, Williams appeals.

Our review of the briefs and consideration of the arguments of the parties has revealed that this appeal is without merit, especially since the Union took Williams' grievance to arbitration even though it had no duty to do so. See Vaca v. Sipes, 386 U.S. 171, 191 (1967). Accordingly, we affirm the judgment of the district court for the reasons stated in that court's persuasive opinion. Williams v. Air Wisconsin, Inc., 874 F. Supp. 710 (E.D. Va. 1995).

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED

February 13, 1996

No. 95-1285
CA-94-212

ALAN H. WILLIAMS

Plaintiff- Appellant

v.

AIR WISCONSIN, INCORPORATED; INTERNATIONAL ASSOCIATION OF MACHINIST@S AND AEROSPACE WORKERS; 1,AMAW AIR TRANSPORT, DISTRICT 143

Defendants- Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for reheating in banc were submitted to this Court. As no member of this Court on the panel requested a poll on the suggestion for rehearing In Banc, and as the panel considered

the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition fox rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Beit M. Montague
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

ALAN H. WILLIAMS,

Plaintiff,

v. Civil Action No. 3:94cv212

AIR WISCONSIN, INC.,
INTERNATIONAL ASSOCIATION
OF MACHINISTS & AERO SPACE
WORKERS and IAM AIR
TRANSPORT, DISTRICT 143,

Defendants.

ORDER

For the reasons set forth in the Memorandum Opinion issued herewith, the defendants' motions for summary judgment are granted.

The action is dismissed with prejudice.

The Clerk is directed to send a copy of this Order to all counsel of record.

It is so ORDERED.

/s/
United States District Judge

Richmond, Virginia
Date: January 20, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

ALAN H. WILLIAMS,

Plaintiff,

v. Civil Action No. 3:94cv212

AIR WISCONSIN, INC., INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS and IAM AIR TRANSPORT, DISTRICT 143,

Defendants.

MEMORANDUM OPINION

Alan H. Williams was employed by Air Wisconsin, Inc. from 1978 through 1992, when his employment was terminated on grounds of time card falsification. In this action, Williams alleges that the termination constituted a breach of the collective bargaining agreement between Air Wisconsin and Williams' former collective bargaining representative, International Association of Machinists and

Aerospace Workers (IIIAMII) and IAM Air Transport District 143 ("District 143") (collectively "Union") . Williams has also sued the Union for breach of the duty of fair representation.

## STATEMENT OF FACTS

The collective bargaining agreement between Air Wisconsin and the Union provides for three classifications of maintenance employees: mechanics, lead mechanics, and inspectors. A mechanic is responsible for various mechanic and administrative functions.

A lead mechanic performs the same work as a mechanic, but is responsible for coordinating the work of other mechanics. An inspector carries out the functions and duties of the inspection department. Lead mechanics and inspectors are entitled to receive an $0.85 per hour premiuli pay differential not available to mechanics. During the period that is the subject of this action, Williams was employed as a mechanic.1 However, as work required, a mechanic could be temporarily upgraded to lead mechanic or inspector status, thereby earning the $0.85 per hour

premium pay differential.

On July 5, 1992 Williams claimed 12 hours of premium pay. The time card does not require specification of whether premium pay is due for inspector work or for lead mechanic work. On August 4, 1992, Williams received an Incident Investigation form advising that he was being investigated for time card falsification on July 5. Also on August 4, Williams stated in writing that he had performed inspector duties on July 5, although he later retracted that explanation and claimed to have worked as a lead mechanic. On August 6, 1992, Williams and Union representative Lonnie Sanders attended an initial hearing on this charge. At that hearing, Air Wisconsin terminated Williams.

On August 12, 1992, the Union filed a grievance on Williams' behalf and thereafter appealed the grievance through the several steps provided in the collective bargaining agreement.

---

1 Air Wisconsin originally hired Williams as a mechanic in 1978 in Appleton, Wisconsin. He later transferred to Ft. Wayne, Indiana and became an inspector in 1983. He

continued to work as an inspector following his transfer to Richmond, Virginia. In the spring of 1992, when Air Wisconsin discontinued its maintenance operations in Richmond, Williams was transferred to Dulles and reverted to mechanic status. Air Wisconsin alleges that Williams'dissatisfaction with this change motivated him to falsely claim premium pay. Williams denies this allegation.

Each appeal was denied. Williams and Sanders agreed that the grievance should be advanced to arbitration before the three member System Board of Adjustment, consisting of one Union member, one Air Wisconsin representative, and a neutral arbitrator.

At the same time that Williams and the Union were pursuing Williams' grievance, the Union was in the process of renegotiating the collective bargaining agreement with Air Wisconsin. During these contract negotiations, Sanders and Ronald L. Anderson, the general chairman of District 143, repeatedly requested Air Wisconsin to reinstate Williams. Air Wisconsin refused to rehire Williams but agreed to conduct an independent investigation into the matter. A subsequent audit of a 45 day period revealed that

Williams had claimed 167.5 hours of unauthorized premium pay for work that he had not performed.

On April 28, 1993, Williams' grievance went to arbitration before the three member panel. Williams was represented by Anderson, Sanders, and IAM chief steward Timothy Regan. In preparation for arbitration, Anderson had asked Williams to prepare a list of witnesses to subpoena for the arbitration. All of the five people listed by Williams were contacted and four testified.2

Williams also testified. The Union attempted unsuccessfully to limit the arbitration to the events of July 5.3

---

2 The fifth declined to testify on Williams' behalf and instead testified for Air Wisconsin.

3 The Incident Investigation form dated August 4, 1992 referred only to premium pay claimed on July 5, 1992. From this, the Union argued that Williams had been discharged for the events on July 5 only and that the basis for his discharge should not be expanded at arbitration. The arbitrator's decision rejected this argument and took into account the

allegations of time card falsification from July 4 through July 8, 1992.

After the three day arbitration hearing, the Union filed a post-hearing brief on Williams' behalf. In a decision dated October 4, 1993, Williams' grievance was denied for the reasons that Williams had claimed premium pay to which he was not entitled from July 4 through July 8 and that the discharge was appropriate and was

neither arbitrary, capricious nor discriminatory.

Williams' complaint against Air Wisconsin asserts that he never claimed premium pay to which he was not entitled and that he was fired in retaliation for cooperating with an FAA investigation of Air Wisconsin. According to Williams, in 1991 Air Wisconsin had directed its maintenance personnel to release for service certain aircraft which it knew were unsafe. Williams contends that he "supplied critical information to the (FAA) and otherwise assisted the FAA in its investigation to assure that [an unsafe aircraft] was grounded until it could be repaired and flown safely." (Plaintiff's Response Mem., pp. 1-2). Williams alleges that "Air Wisconsin had an unwritten policy of getting rid of employees who reported safety problems to the FAA." (Plaintiff's Response Mem.,p- 2).

Williams' complaint against the Union is that it breached the duty of fair representation by failing to interview and call witnesses whose testimony could have proven that Williams was discharged in retaliation for cooperating with the FAA. Williams also makes the assertion

that the Union's representation was deficient because the "whole thrust of the Plaintiff's defense at the arbitration proceeding should have been the fact that he was fired for being a whistle-blower," and the Union did not properly emphasize this theory. (Plaintiff's Response, p. 4).

DISCUSSION

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). It is the function of the district court not to weigh the evidence, but to determine whether there is a genuine issue for trial and "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to

return a verdict for that party. Id. at 249 (citations omitted) (emphasis added).

This dispute is governed by the Railway Labor Act, 45 U.S.C. Section 151 et seq. ("RLA"). The RLA vests in the System Board of Adjustment exclusive jurisdiction over "minor" disputes such as breach of collective bargaining agreements.4 See Hawaiian Airlines, Inc. v. Norri@, 114 S. Ct. 2239, 2244 (1994); Consolidated Rail Consolidation v. Rail-way Labor Executives Assoc., 491 U.S. 299, 303-04 (1989).

---

4 The terms "major" and "minor" as used in the RLA are terms of art, not judgments of the importance of the dispute to any party. "Major" disputes concern "rates of pay, rules or working conditions" and "relate to 'the formation of collective bargaining agreements or efforts to secure them"' Hawaiian Airlines, Inc. v. Norris, 114 S. Ct. 2239, 2244 (1994) (citations omitted). "Minor" disputes

"'grow out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions" and "'involve controversies over the meaning of an existing collective bargaining agreement in a particular fact situation. I" Id. Williams alleges that Air Wisconsin breached an existing collective bargaining agreement. Therefore, the dispute in this action is "minor."

However, courts have recognized an exception to the exclusive and final jurisdiction of the System Board of Adjustment where the plaintiff brings a so called "hybrid action" in federal court. In a hybrid action, the plaintiff seeks redress of the employers breach of the collective bargaining agreement and of a breach by the Union of its duty of fair representation. See Glover v. St. Louis-San francisco Ry. Co., 393 U.S. 324f 328-29 (1969); Bautista v. Pan Am. World Airlines, 828 F.2d 546, 551-52 (9th Cir. 1987).
The rationale which forms the basis for this exception is

that, if a union's breach of duty "seriously undermines the integrity of the arbitral process, the union's breach also removes the bar of the finality provisions of the contract." Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976).

Under the RLA and the decisions interpreting it in hybrid actions, this court has jurisdiction over Williams' challenge of Air Wisconsin's conduct only if Williams also has a claim against the Union for breach of its duty of fair representation. See Hardee v. North Carolina Allstate Svc., Inc., 537 F.2d 1255, 1258 (4th Cir. 1976); Bautista, 828 F.2d at 551-52; Trial v. Atchison, Topeka & Santa Fe Ry. Co., 896 F.2d 120, 123 (5th Cir. 1990); Hope v. Continental Baking Co., 729 F. Supp. 1556, 1558 (E.D. Va. 1990). If there is no genuine issue of material fact as to a breach of this duty by the Union, the court need not consider the remaining claim against the employer. See Bautista, 828 F.2d at 551-52. Therefore, before addressing the propriety of Air Wisconsin's actions, it is necessary to consider whether there is a genuine issue of material fact as to the alleged breach of the Union's duty of fair representation.

A. Union's Duty of Fair Representation

The duty of fair representation requires the Union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Vaca v. Sipes, 386 U.S. 171, 177 (1967). A union breaches the duty of fair representation when its conduct is "arbitrary, discriminatory, or in bad faith." Dement v. Richmond, Fredericksburg & Potomac R. Co., 845 F.2d 451, 458 (4th Cir. 1988).

The judiciary's evaluation of a union's performance "must be highly deferential." Air Line Pilots Ass'n, Int'l v. O,'Neill, 499 U.S. 65, 78 (1991). The Fourth Circuit has held that "simple negligence, ineffectiveness, or poor judgment is insufficient to establish a breach of the i;nion's duty . . . Rather, the union's conduct must be 'grossly deficient' or in reckless disregard of the member's rights." Ash v. United Parcel Serv., Inc., 800 F.2d 409,
411 (citations omitted) (emphasis added). "Honesty and good faith are demanded of [the union], but as long as there are those ingredients in its conduct, a

union has broad discretion in treating competing interests of members of the collective bargaining unit.,' Smith v. Local 7898, United Steelworkers of Am., 834 F.2d 93, 96 (4th Cir. 1987). "When the evidence does not tend to establish the severely deficient union conduct required for a breach of the duty of fair representation, summary judgment is appropriate.'' Ash, 800 F.2d at 412.

Accordingly, where the union makes use of available grievance and arbitration procedures on the employee's behalf and the employee challenges the union's actions in pursuing the grievance, the district court's focus is on whether "the employer breached the contract and whether there is substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings." Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 568 (1976) (emphasis added). Hines therefore presents two questions that are pertinent to the issue of breach of duty by the Union: whether the evidence is sufficient to support a finding that the Union breached its duty, and whether there is substantial reason to believe that the breach contributed to the erroneous

outcome of the contractual proceedings. Hardee v. North Carolina Allstate Services, Inc., 537 F.2d 1255, 1258 (1976); Ash, 800 F.2d at 411.

1. Does The Union's Conduct Constitute Breach of Duty?

Williams, argument that the Union breached its duty of fair representation focuses on the purported failure to interview and call certain witnesses and on the Union's failure properly to emphasize the argument that Williams was fired because of his cooperation with the FAA. A review of the record is necessary to put these arguments in perspective.

Williams consistently has contended that he "never claimed time or pay to which [he] was not entitled." (Williams Dep., p.1) Nevertheless, Williams now argues that the Union's decision to focus his defense on his innocence was arbitrary, discriminatory or in bad faith. Nothing in the record suggests that the Union's decision to focus on Williams' innocence of the offense charged was motivated by anything other than strategic factors borne of

Williams' strenuously asserted claims of innocence. Indeed, by proving that Williams had claimed only that pay to which he was entitled, the Union would have secured certain reversal of his discharge, making unnecessary a speculative sojourn into Air Wisconsin's alleged improper motives. Although, the Union's strategic judgment "need not appear as wise in the glaring light of hindsight," Smith v. Local 7898, United Steelworkers of Am., 834 F.2d 93, 96 (4th Cir. 1987), even with hindsight, the Union's strategy here appears neither arbitrary, discriminatory, or in bad faith. That result is not altered because the strategy was unsuccessful. Williams also argues that, because his Union representatives were involved in contract negotiations with Air Wisconsin at the time of this arbitration, the Union's strategy was motivated by a desire to stay on Air Wisconsin's good side. This speculation is not supported by a shred of evidence. A party cannot create a genuine issue of material fact "through mere speculation or the building of one inference upon another." Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985).

The record establishes that the

Union went to arbitration with Air Wisconsin on Williams' behalf, notwithstanding the ongoing contract negotiations. Indeed, the Union even made Williams, reinstatement an issue in those negotiations. This approach secured an independent investigation of the time card fraud allegations. Unfortunately for Williams, the investigation revealed numerous other instances of fraud on his part. Even if a reasonable juror could conclude from the evidence that the Union's strategy was erroneous, the evidence could not support a finding that the Union's conduct was arbitrary, discriminatory, or in bad faith because "a violation of the duty of fair representation is not made out by proof that the union made a mistake in judgment." Smith, 834 F.2d at 96.

in this action that the Union was deficient. However, what is more important on a motion for summary judgment, a reasonable juror
could not find that the Union committed the egregious conduct required f or a breach of the duty

of f air representation by failing to communicate with, or call, witnesses whom Williams himself did not include on his witness list when he had the opportunity.

Moreover, an examination of the recently submitted testimony of the new witnesses establishes that Williams has failed to create a genuine issue of material fact that the Union breached its duty. This is because, in each instance, the Union has articulated legitimate reasons for its actions and Williams has not shown those reasons to be pretextual. Therefore, a reasonable jury could not find the Union's actions to have been arbitrary, discriminatory, or in bad faith.

Williams first submits the sworn affidavit of Manuel Carvalho who avers that he, like Williams, cooperated with the FAA; that Air Wisconsin pressured employees to release aircrafts that were unsafe; that Air Wisconsin officials had told him that employees who reported safety problems to the FAA would be terminated; and that he tape recorded a conversation in which he was told to get the planes out "or else." (Carvalho Affidavit, p. 1). Williams contends that

Carvalho is the "smoking gun" which necessitates a trial. (Plaintiff's Response Mem., p. 6).

The Union responds that Anderson spoke with Carvalho before the hearing and decided not to have him testify for the reason that Anderson concluded that Carvalho would lack credibility because he had recently been fired by Air Wisconsin for time card fraud. Further, Anderson had used Carvalho as a witness in a previous arbitration and, based on that performance, Anderson had concluded that Carvalho was an extremely poor witness who appeared evasive and lacked credibility. Finally, Carvalho's affidavit admits that he did not tell Anderson that he had a tape recording to support his story. These are cogent and ersuasive reasons not to have called Carvalho as a witness. Williams presents no evidence suggesting that this explanation is pretextual. From this evidence, a reasonable juror could not f ind that the Union breached its duty in failing to call Carvalho.

Next, Williams presents the declarations of John Francissen and Gerry Martinez, two FAA inspectors who apparently would have testified that Williams

cooperated in their investigation of Air Wisconsin. The affidavits of Francissen and Martinez also set forth that they had heard the tape recording to which Carvalho now refers, although neither can recall what was on it. Francissen attaches to his affidavit a document which includes notes on the statement of an Air Wisconsin supervisor, Kevin Reinhalter, taken by another FAA investigator. According to this document, Reinhalter had been told that, if he could not keep his inspectors in line, Air Wisconsin would find someone who could.5

For the Union, Anderson explains that he does not recall any mention of these two individuals by Williams.6 However, Anderson

---

5 Incidentally, Reinhalter was Air Wisconsin's designated representative on the arbitration panel.

6 On a motion to dismiss, the court takes as true Williams' sworn statement that he did mention these witnesses to the Union.

states that he would not have called them in any event because their testimony would have related to the uncontested fact that Williams cooperated with the FAA. Williams did not request

that the Union subpoena Francissen and Martinez, nor did he inform the Union that they possessed any information other than the undisputed fact that he had cooperated with the FAA.

A juror might conclude that the Union showed poor judgment in failing to communicate with these witnesses, or even that it was negligent in its failure to do so. However, "simple negligence, ineffectiveness or poor judgment is insufficient to establish a breach of the union's duty." Ash v. United Parcel Serv. , Inc., 800 F.2d 409, 411 (4th Cir. 1986). There is no evidence that the failure to contact Martinez and Francissen was the result of bad faith, or discriminatory intent, nor was the Union's conduct so egregious as to be deemed arbitrary. A reasonable jury could not permissibly conclude that the Union breached its duty of fair representation.

Williams next challenges the Union's failure to call as a witness Robert Wilcox, who in affidavit states now that he would
have testified to Williams' good character and to Williams' ability as a mechanic. Anderson considered Wilcox's testimony to be cumulative and

unnecessary because another Union witness had testified at length to Williams' good character. There was no contention that Williams lacked ability to perform as a mechanic. There is no basis from which a jury could infer that the failure to call Wilcox was arbitrary, discriminatory, or in bad faith.

Williams also has tendered the declaration of James Neitzke. Although Neitzke testified on Williams' behalf., Neitzke claims to have informed the Union that Giles Hieptas, a key witness for Air Wisconsin, had a bad reputation for truthfulness and that, in his opinion, Hieptas was not worthy of belief. Anderson concedes that he did not question Neitzke about Hieptas' credibility, but he explains that he extensively cross-examined Hieptas himself. The Union's failure to question Neitzke about the particular subject of Hieptas' credibility does not rise to the level of a breach of the Union's duty of fair representation, especially where the Union attacked Hieptas extensively on cross-examination.

Williams' contention that the Union's conduct respecting these five putative witnesses

constitutes a breach of duty is based almost exclusively on Black v. Ryder/P.I.E. Nationwide, Inc., 15 F.3d 573 (6th Cir. 1994). In Black, a truck driver was suspended and later d@charged for having returned a truck to a depot without reporting that the truck had been damaged. In his grievance proceeding, Black argued that the truck was undamaged when he left it at the terminal and that any damage must have occurred after that time. Black was represented by a union rival with whom he had an "acrimonious history." Id. at 577.7 The union representative refused to travel to Birmingham to interview the mechanic who had repaired the truck and had signed the damage report, the crucial piece of evidence on which the employer rested its case against Black. Had the representative interviewed the mechanic, he would have learned that the mechanic had no knowledge of the condition of the truck when Black left it at the terminal.

On these facts, the Sixth Circuit held:

> Evidence presented at trial was such as to allow the jury to conclude either that the union's conduct, under the circumstances, was so arbitrary and unreasonable as to be

beyond the realm of the rational, or that the union was motivated by bad faith or discriminatory animus against Black, an intra-union rival.

---

7. The representative held a position of power in the union and Black was an active leader of a dissident group which had threatened the positions of the union leadership. Tensions between Black and union leadership had culminated in a lawsuit in which Black was awarded $40,000 in damages.

Black, 15 F. 3d at 585 (emphasis added). From this, Williams argues that the Union's failure to interview and call certain witnesses and to properly emphasize the whistle-blower theory are either arbitrary or suggestive of collusion between Air Wisconsin and the Union. (Plaintiff's Response Mem.., p. 7).

Turning first to the collusion issue, Black did not hold that the union's failure to interview the mechanic was itself "sufficient -t-o allow a jury to conclude that the grievance proceeding against him

was the result of collusion between the union and management. 11 (Plaintiff Is Response Mem. , p. 7) . Rather, the court articulated, as the basis for its decision, the substantial evidence of animus between the union representative and Black. This evidence, which, of course, is completely lacking in the present case, created a basis on which the jury could have found that the union representative acted in bad faith and colluded with the employer. Willi@ms admits that he has no reason to believe anyone in the Union bore him any animosity or ill-will. (Williams Dep., pp. 35-36).

Williams also asserts that a jury could infer collusion from the facts that contract negotiations were ongoing at the time of the arbitration and that the Union did not emphasize the theory that Williams had been fired because he cooperated with the FAA. Williams offers no evidence to support a link between those facts. Moreover, the record establishes that the Union even tried to use the contract negotiations as a vehicle to secure reinstatement for Williams. On this record, the decision in Black does not require submission of the collusion issue to a jury.

Black did hold that, on its facts, the Union's failure to communicate with a witness could be so arbitrary and unreasonable as to constitute a breach of duty. However, Black is not applicable to the facts in this action. In Black, the union failed, for no apparent reason, to communicate with a key witness on the outcome determinative issue: whether the truck was returned in a damaged condition. The knowledge of that witness was crucial to the employer's ability to prove that Black committed the offense for which he was terminated and conversely to Black's effective defense. That simply is not what happened here.

None of the witnesses now raised by Williams possessed any information respecting whether Williams had claimed premium pay to which he was not entitled. The testimony of each went either to the collateral theory of Air Wisconsin's improper motives or to more general issues, such as character and ability. The Union has articulated reasons for each of its decisions and there is no evidence showing those reasons to be pretextual. Moreover, in perspective of the extensive efforts that the Union actually made on Williams' behalf, the failure to

communicate with these peripheral witnesses can be considered neither arbitrary nor capricious nor in bad faith. Therefore, the Union did not breach its duty of fair representation in its handling of these witnesses.

As a last ditch effort to prove some egregious misconduct by the Union, Williams argues that the Union did not gather certain documents as early in the proceedings as it should have. As Williams puts it: "[e]ven as to the battle of documents, the union's ill will is clear." (Plaintiff's Response Mem., p. 5). However, Williams presents no evidence that any delay in requesting documents was the result of ill-will, bad faith, discriminatory intent, or even that it was arbitrary. Nor does Williams even contend that the proceedings were prejudiced in any way by the alleged delay in requesting documents. Therefore, this delay provides no basis from which a jury could infer a breach of duty by the union.

Because the evidence is insufficient to support a finding that the Union breached its duty of fair representation, summary judgment is appropriate as to the

Union.

2. Is There Substantial Reason To Believe Union's Conduct Contributed To An Erroneous Outcome?

Williams has also failed to present evidence that "there is substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings." Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 568 (1976); Hardee v. North Carolina Allstate Services, Inc., 537 F. 2d 1255, 1258 (4th Cir. 1976) ; Ash v. United Parcel Serv., Inc., 800 F.2d 409, 411 (4th Cir. 1986). The plaintiff must show that the alleged misconduct "influenced" the result of the arbitration. Hardee, 537 F.2d at 1258. Williams has presented an alternative approach that the Union could have pursued without providing sufficient evidence for a jury to conclude that, had this approach been followed, the result of arbitration would have been

different. If Williams' evidence cannot support a finding that there is substantial reason to believe that the challenged conduct contributed to an erroneous outcome or influenced the arbitrator's decision, the "arbitral bar" is not lifted and this court lacks jurisdiction to reconsider the arbitrator's decision. Id.

Williams argues that, had the Union properly emphasized the whistle-blower theory, the arbitrators "could have inferred or concluded that Air Wisconsin would lie." (Plaintiff's Response, p. 5). The arbitration award held that Williams was not entitled to the premium pay that he had claimed and that he did not mistakenly believe that he was so entitled. Neither the evidence nor basic logic suggests that a different conclusion would have been reached had the Union focused less on Williams' innocence of that charge and more on the whistle-blower theory of his discharge. The arbitration award is a very deliberate analysis of the kind of work for which premium pay was appropriate under the collective bargaining agreement and whether the evidence reflected that Williams performed that kind of work on the days

in question. Williams has not demonstrated that the approach that he now proposes would have altered this analysis or its outcome.

Had the Union presented evidence that Williams cooperated with the FAA and that Air Wisconsin officials suggested that such employees would be fired, the arbitrators would presumably have been left with two lines of evidence. one would have suggested that Williams was a whistle-blower and that Air Wisconsin had expressed an intention to fire whistle-blowers. The other, however, would still have suggested that Williams committed time card falsification. The only evidence that refutes the facts underlying the decision against Williams on the issue of time card falsification, Williams' own testimony of his innocence, was considered at the arbitration and rejected in light of evidence to the contrary. Williams simply cannot prove that he would have been exonerated h-ad the Union followed the approach that he now advocates.

B. Air Wisconsin and the Alleged Breach of Collective Bargaining Agreement

Because summary judgment is appropriate as to the complaint against the Union, the arbitration decision in favor of Air Wisconsin is final and this court lacks jurisdiction to reconsider it. Hardee v. North Carolina Allstate Services., Inc., 537 F.2d 1255, 1258 (4th Cir. 1976) ; Bautista v. Pan American World Airlines, Inc., 828 F.2d 546, 551-52 (9th Cir. 1987); Trial v. Atchison, Topeka & Santa Fe Ry. Co., 896 F.2d 120, 123 (5th Cir. 1990); Hope v. Continental Baking Co., 729 F. Supp. 1556, 1558 (E.D. Va. 1990). Therefore, Air Wisconsin's motion for summary judgment is granted as well.

## CONCLUSION

Williams has failed to create a genuine issue of material fact that the Union breached its duty of fair representation or that the conduct contributed to an erroneous outcome of the proceedings. Therefore, the motion for summary judgment by IAM and District 143 is granted.

Because summary judgment is appropriate as to the Union, this court lacks jurisdiction over the claim against Air Wisconsin.

Therefore, the motion for summary judgment by Air Wisconsin is also granted.

The action is therefore dismissed with prejudice.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

United States District Judge

Richmond Virginia
Date: JAN 20 1995

BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

Section 411. Bill of rights; constitution and bylaws of labor organizations. Every member of a labor organization shall have equal privileges within such organization to nominate candidates, to elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization

his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) Dues, initiation fees, and assessments. Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act [enacted Sept. 14, 19591 shall not be increased, and no general or special assessment shall be levied upon such members, except-

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in ood standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote

of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constitutent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: Provided, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) Protection of the right to sue. No labor organization shall limit the right of any member thereof to institute an ac.tion in any court,

or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof. And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action. No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time

to prepare his defense; (C) afforded a full and fair hearing.
(b) Invalidity of constitution and bylaws. Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect. (Sept. 14, 1959, P. L. 86-257, Title 1, § 101, 73 Stat. 522.)

Section 412. Civil action for infringement of rights; jurisdiction. Any person whose rights secured by the provisions of this title [29 USCS §§ 411 et seq.] have been infringed by any violation of this title [29 USCS §§ 411 et seq.] may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.
(Sept. 14, 1959, P. L. 86-257, Title 1, § 102, 73 Stat. 523.)

Section 151.Definitions; short title When used in this Act and for the purposes of this Act--

First. The term "carrier includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": Provided, however, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term

"carrier" shall not include any company by reason of its being engaged in the mining of coal,, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this Act.

Third. The term "Mediation Board" means the National Mediation Board created by this Act.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the district of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise

and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hermftr entered by the Comnussion pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement

by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the Supreme Court of the District of Columbia [United States District Court for the District of Columbia]; and the term "circuit court of appeals [court of appeals]" includes the Court of Appeals of the District of Columbia [United States Court Of Appeals for the District of Columbia].

This Act may be cited as the "Railway Labor Act."
(May 20, 1926, ch 347, Title 1, §1, 44 Stat. 577; June 21, 1934, ch 691, § 1, 48 Stat. 1185; April 10, 1936, ch 166, 49 Stat. 1189; Aug. 13, 1940, ch 664, §§ 2, 3, 54 Stat. 785.)

§ 152. General duties

First. Duty of carriers and employees to settle disputes. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof

Second. Consideration of disputes by representatives. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives. Representatives, for the purposes of this Act shall be designated by the respective parties without interference,

influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful

for
any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective
bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden. No carrier, its

officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act [enacted May 20, 1926], then such carrier shall notify the employees by an appropriate order that such contract has been discarded
and is no longer binding on them in any way.

Sixth. Conference of representatives; time; p@; private agreements. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements
concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days a ter the receipt of notice of a desire on the part of either party to confer in res@t to such dispute, to specify a time and place at which such conference ihall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time

so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: And provided further, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules or working conditions contrary to agreement or to section 156 forbidden. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as
embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act [45 USCS § 1561.

Eighth. Notices of manner of settlement of disputes; posting. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all
disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there

shall be printed verbatim, in large type, the third fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative

so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecutions and penalties. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth,

seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States [United States attorney] to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: Provided, That nothing in this Act shall be construed to require an individual employee to render labor or service without his

consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements; check-off. Notwithstanding any other provisions of this Act, cr of any other statute or law of the United States, or Territory thereof, or any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted-

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all em-

ployees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom

membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties), uniformly required as a condition of acquiring or retaining membership, Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the

applicable collective agreement, whichever occurs
sooner.
(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, first (h) of this act [45 USCS § 153, subsec. First, para. (h)] defining the jurisdictional scope of the first division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope,
organized in accordance with this act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor

organizations, national in scope, organized in accordance with this act and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him; Provided,
further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or
class in any of said services.
(d) Any provisions in paragraphs fourth and fifth of section 2 of this act [this section] in conflict herewith are to the extent of such conflict amended.
(May 20, 1926, ch 347, Title 1, § 2, 44 Stat. 577; June 21, 1934, ch 691, § 2, 48 Stat. 1186; April 10, 1936, ch 166, 49 Stat. 1189; Jan. 10, 1951, ch 1220, 64 Stat. 1238.)

§ 153. National Railroad Adjustment Board
First. Establishment; composition; powers and duties; divisions; hearings a awards Judicial review.
There is hereby established a Board, to be known the "National

Railroad Adjustment Board", the members of which shall selected within thirty days after approval of this Act [enacted June 21, 193 and it is hereby provided-

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been may be organized in accordance with the provisions of section 2 of this Act [45 USCS §§ 151a, 152].

(b) The carriers, acting each through its boards of directors or its receiver or receivers, trustee or trustees or through an officer or officers designation for that purpose by such board, trustee or trustees or receiver or receivers shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one vote representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) this section, acting each through the chief

executive or other media designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall selected and shall select such members and designate the division which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filed by selection in the same manner as the original selection.

(e) If either the carriers or the labor organizations of the employees fails to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act [enacted June 21, 1934], in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is

to represent.
(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the la@r members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor
has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the
labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in
accordance with section 2 hereof [45

USCS §§ 151a, 152] and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per them allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers, that is, engineers, firemen, hostlers, and outside hostler helpers, conductors,

trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with section 2 hereof [45 USCS §§ 151a, 152] and which represent employees in engine, train, yard, or hostling service; Provided, however, That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the first Division or in the adoption of any award with respect to any dispute submitted to the First Division: Provided further, however,

That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have, jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners,

power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations

of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act [enacted June 21, 1934], shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct

hearings and make findings upon disputes, when Properly submitted, at any place designated
by the division: Provided, however, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.
(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forth-
with agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these

neutral referees as are provided elsewhere in this Act iror the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an

award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of

the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of

the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole
or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for
failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment

Board, and not after.
(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.
(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.
(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.
(v) The Adjustment Board shall meet within forty days after the approval of this Act [enacted June 21, 1934] and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conffict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the

selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: Provided, however, That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairinanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by
the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation
Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries,
and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys

appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be neces-
sary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon the disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as ref-
eree, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (1) hereof,

with respect to a division of the Adjustment Board.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, compenmsation designation of representatives by Mediation Board, neutral member, compensation quorum, finality and enforcement of awards. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their accordance with the provisions of this Act, from of system, group, or regional boards of adjusting and deciding disputes of the sect on. In the event that either party to such a system, group, or regio board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes

otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be deaned in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board,, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual

associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to
the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of
the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and dispo-

sition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person selected or appointed shall be compensated and reimbursed for expenses the Mediation Board. Any two members of the board shall be competent render an award. Such awards shall be final and binding upon both to the dispute and if in favor of the petitioner, shall direct the other party comply therewith on or before the day, named. Compliance with awards shall be enforcible by proceedings in the United States district court in the same manner and subject to the same provisions that apply proceedings for enforcement of compliance with awards of the Adjustment Board.

(May 20, 1926, ch 347, Title 1, § 3, 44 Stat. 578; June 21, 1934, ch 691, §48 Stat. 1189; April 10, 1936, ch 166, 49 Stat. 1189;

June 20, 1966, P. 89-456, §§ 1, 2, 80 Stat. 208, 209; April 23, 1970, P. L. 91-234, §§ 1-6, Stat. 199, 200.)

154. National Mediation Board First. Board of Mediation abolished; National Mediation Board established; composition; term of office; qualifications; salaries; removal. The Board of Mediation is hereby abolished, effective thirty days from the approval of this Act [enacted June 21, 1934] and the members, secretary, officers, assistants, employees, and agents thereof, in office upon the date of the approval of this Act [enacted June 21, 1934], shall continue to function and receive their salaries for a period of thirty days from such date in the same manner as though this Act had not been passed. There is hereby established, as an independent agency in the executive branch of the Government, a board to be known as the "National Mediation Board", to be composed of three members appointed by the President, by and with the advice and consent of the Senate, not more than two of whom shall be of the same political party. Each member of the Mediation Board in office on January 1, 1965, shall be deemed to have been appointed for

a term of office which shall expire on July 1 of the year his term would have otherwise expired. The terms of office of all successors shall expire three years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board. Two of the members in office shall constitute a quorum for the transaction of the business of the Board. Each member of the Board shall receive [a salary at the rate of $ 1 0,000 per annum, together with] necessary traveling and subsistence expenses, or per them allowance in lieu thereof, subject to the provisions of law applicable thereto, while away from the principal office of the Board on business required by this Act. No person in the employment of or who is pecuniarily or otherwise interested in any organization of employees or any carrier shall enter upon the duties of or

continue to be a member of the Board. Upon the expiration of his term of office a member shall continue to serve until his successor is appointed and shall have qualified.

All cases referred to the Board of Mediation and unsettled on the date of the approval of this Act [enacted June 21, 1934] shall be handled to conclusion by the Mediation Board.

A member of the Board may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause.

Second. Chairman; principal office; delegation of powers; oaths; seal; report. The Mediation Board shall annually designate a member to act as chairman. The Board shall maintain its principal office in the District of Columbia, but it may meet at any other place whenever it deems it necessary so to do. The Board may designate one or more of its members to exercise the functions of the Board in mediation proceedings. Each member of the Board shall have power to administer oaths and affirmations. The Board shall have a sea] which shall be judicially noticed. The Board shall make an annual report to

Congress.

Third. Appointment of experts and other employees; salaries of employees; expenditures. The Mediation Board may (1) appoint such experts and assistants to act in a confidential capacity and, subject to the provisions of the civil-service laws, such other officers and employees [subject to the provisions of the civil service laws, appoint such experts and assistants to act in a confidential capacity and such other officers and employees] as are essential to the effective transaction of the work of the Board; (2) in accordance with the Classification Act of 1923, fix the salaries of such experts, assistants, officers, and employees; and (3) make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding, and including expenditures for salaries and compensation, necessary traveling expenses and expenses actually incurred for subsistence, and other necessary expenses of the Mediation Board, Adjustment Board, Regional Adjustment Board established under paragraph (w) of section 3 [45 USCS Section 153(w)], and the boards

of arbitration, in accordance with the provisions of and 7 [45 USCS §§ 153, 157], respectively), as may be necessary for the execution of the functions vested in the Board, in the Adjustment Board and in the boards of arbitration, and as may be provided for by the Congress from time to time. All expenditures of the Board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

Fourth. Delegation of powers and duties. The Mediation Board is hereby authorized by its order to assign, or refer, any portion of its work, business, or functions arising under this or any other Act of Congress, or referred to it by Congress or either branch thereof, to an individual member of the Board or to an employee or employees of the Board to be designated by such order for action thereon, and by its order at any time to amend, modify, supplement, or rescind any such assignment or reference. All such orders shall take effect forthwith and remain in effect until otherwise ordered by the Board. In conformity with and subject to the order or orders of the Mediation Board in the premises, [and] such individual member of the Board or employee designated

shall have power and authority to act as to any of said work, business, or functions so assigned or referred to him for action by the Board.

Fifth. Transfer of officers and employees of Board of Mediation; transfer of appropriation. All officers and employees of the Board of Mediation (except the members thereof, whose offices are hereby abolished) whose services in the judgment of the Mediation Board are necessary to the efficient operation of the Board are hereby transferred to the Board, without change in classification or compensation; except that the Board may provide for the adjustment of such classification or compensation to conform to the duties to which such officers and employees may be assigned.

All unexpended appropriations for the operation of the Board of Mediation that are available at the time of the abolition of the Board of Mediation shall be transferred to the Mediation Board and shall be available for its use for salaries and other authorized expenditures.

(May 20, 1926, ch 347, Title I, § 4, 44 Stat. 579; June 21, 1934, ch 691, § 4, 48 Stat. 1193; April 10, 1936, ch 166, 49 Stat. 1189; Aug. 31, 1964, P. L. 98-542, 78 Stat.

748.)

Section 155. Functions of Mediation Board

First. Disputes within jurisdiction of Mediation Board. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once

endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act [45 USCS § 160])
to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration or an emergency board shall be created under section 10 of this Act [45 USCS § 160], no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. Interpretation of agreement. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement.

The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Third. Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contracts with Board; custody of records and documents. The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 7 of this Act [45 USCS § 157]:

(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 7 of this Act [45 USCS § 157], it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested

and impartial, then, upon proper investigation and presentation of the facts,
the Board shall promptly remove such arbitrator.

If an arbitrator named by the Mediation Board, in accordance with the provisions of this Act, shall be removed by such Board as provided by this Act, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this Act for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this Act, When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a circuit court of appeals [court of appeals] of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board

has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or

subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it.
No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpreta-
tions suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after the approval of this Act [enacted June 21, 1934] every carrier shall file with the Mediation Board a copy of each contract with its employees in effer-t on the Ist day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of
its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact including also a statement of

the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract
with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and
their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to
the Mediation Board and to

require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession.
(May 20, 1926, ch 347, Title 1, § 5, 44 Stat. 580; June 21, 1934, ch 691, § 5, 48 Stat. 1195; April 10, 1936, ch 166, 49 Stat. 1189.)

§ 156. Procedure in changing rates of pay, rules, or working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended charges shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice.

Section 157. Arbitration

First. Submission of controversy to arbitration. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled

either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner
provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: Provided, however, That the failure or refusal of either party to submit a
controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

Second. Manner of selecting board of arbitration. Such board of arbitration shall be chosen in the following manner:

(a) In the case of a board of three the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall
fail to name the third arbitrator within five days after their first meeting, such third

arbitrator shall be named by the Mediation Board.

(b) In the case of a board of six the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

Third. Board of arbitration; organization; compensation; procedure.

(a) Notice of selection or failure to select arbitrators. When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board; and, in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this Act, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected,

if any, or of their failure to make or to complete such selection.

(b) Organization of board; procedure. The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: Provided, however, That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

(c) Duty to reconvene; questions considered. Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or

application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

(d) Competency of arbitrators. No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with
or partiality to either of the parties to the arbitration.

(e) Compensation and expenses. Each member of any board of arbitration created under the provisions of this Act named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually

incurred for subsistence, while serving as an arbitrator.

(f) Award; disposition of original and copies. The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board, to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: Provided, however, That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act as amended.

(g) Compensation of assistants to board of arbitration; expenses;

quarters. A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

(h) Testimony before board; oaths; attendance of witnesses; production of documents; subpoenas; fees. All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just

determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he hereby is, authorized, and it shall be his duty, to issue such subpoenas.

Any witness appearing before a board of arbitration shall receive the same
fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena.
(May 20, 1926, ch 347, Title 1, § 7, 44 Stat. 582; June 21, 1934, ch 691, § 7, 48 Stat. 1197; April 10, 1936, ch 166, 49 Stat. 1189; Oct. 15, 1970, P.L. 91-452, Title II Section 238, 84 Stat. 930.)

Section 158. Agreement to arbitrate; form and contents; signatures and acknowledgement; revocation

The agreement to arbitrate-

(a) Shall be in writing;

(b) Shall stipulate that the arbitration is had under the

provisions of this Act;

(c) Shall state whether the board of arbitration is to consist of three or of six members;

(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk
of a district court or circuit court of appeals [court of appeals] of the United States, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on

the board of arbitration;

(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: Provided, That the parties may agree at any time upon an extension of this period;

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district

court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate,

when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement:

§ 159. Award and judgment thereon; effect on individual employee

First. Filing of award. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. Conclusiveness of award; judgment. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Impeachment of award; grounds. Such petition for the impeachment or contesting of any award so filed shall be entertained

by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: Provided, however, That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this Act: Provided further, That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for

trivial irregularity or clerical error, going only to form and not to substance.

Fourth. Effect of @al invalidity of award. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: Provided, however, That, if the parties shall agree thereto, and if such valid and invalid part, are separable, the court shall set aside the invalid part, and order judgmen to stand as to the valid part.

Fifth. Appeal; record. At the expiration of ten days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals [court of appeals]. In such case only such portion of the record shall be transmitted to that appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

Sixth. Finality of decision of

circuit court of appeals [court of appeals]. The determination of said circuit court of appeals [court of appeals] upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

Seventh. Judgment where petitioner's contentions are sustained. If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

Eighth. Duty of employee to render service without consent; right to quit. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an

individual employee of such labor or service, without his consent. (May 20, 1926, ch 347, Title I, § 9, 44 Stat. 585; April 10, 1936, ch 166, 49 Stat. 1 189.)

§ 159a. Special procedure for commuter service

(a) Applicability of provisions. Except as provided in section 5 10(h) of the Rail Passenger Service Act [45 USCS § 590(h)], the provisions of this section shall apply to any dispute subject to this Act between a publicly funded and publicly operated carrier providing rail commuter service (including the Amtrak Commuter Services Corporation) and its employees.

(b) Request for establishment of emergency board. If a dispute between the parties described in subsection (a) is not adjusted under the foregoing provisions of this Act and the President does not, under section 10 of this Act [45 USCS § 160], create an emergency board to investigate and report on such dispute, then any party to the dispute or the Governor of any State through which the service that is the subject of the dispute is operated may request the President to establish such an emergency board.

(c) Establishment of emergency board. (1) Upon the request of a party or a Governor under subsection (b), the President shall create an emergency board to investigate and report on the dispute in accordance with section 10 of this Act [45 USCS § 1601. For purposes of this subsection, the period during which no change, except by agreement, shall be made by the parties in the conditions out of which the dispute arose shall be 120 days from the date of the creation of such emergency board.

(2) If the President, in his discretion, creates a board to investigate and report on a dispute between the parties described in subsection (a), the provisions of this section shall apply to the same extent as if such board had been created pursuant to paragraph (1) of this subsection.

(d) Public hearing by National Mediation Board upon failure of emergency board to effectuate settlement of dispute. Within 60 days after the creation of an emergency board under this section, if there has been no settlement between the parties, the National Mediation Board shall conduct a public hearing on the dispute at which

each party shall appear and provide testimony setting forth the reasons it has not accepted the recommendations of the emergency board for settlement of the dispute.

(e) Establishment of second emergency board. If no settlement in the dispute is reached at the end of the 120-day period beginning on the date of the creation of the emergency board, any party to the dispute or the Governor of any State through which the service that is the subject of the dispute is operated may request the President to establish another emergency board, in which case the President shall establish such emergency board.

(f) Submission of final offers to second emergency board by parties. Within 30 days after creation of a board under subsection (e), the parties to the dispute shall submit to the board final offers for settlement of the dispute.

(g) Report of second emergency board. Within 30 days after the submission of final offers under subsection (f), the emergency board shall submit a report to the President setting forth its selection of the most reasonable offer.

(h) Maintenance of status quo during dispute period. From the time a request to establish a board is made under subsection (e) until 60 days after such board makes its report under subsection (g), no change, except by agreement shall be made by the parties in the conditions out of which the dispute arose.

(i) Work stoppages by employees subsequent to carrier offer selected; eligibility of employees for benefits. If the emergency board selects the final offer submitted by the carrier and, after the expiration of the 60-day period described in subsection (h), the employees of such carrier engage in any work stoppage arising out of the dispute, such employees shall not be eligible during the period of such work stoppage for benefits under the Railroad Unemployment Insurance Act [45 USCS §§ 351 et seq.].

(j) Work stoppages by employees subsequent to employees offer selected; eligibility of employer for benefits. If the emergency board selects the final offer submitted by the employees and, after the expiration of the 60-day period described in subsection (h), the carrier refuses to accept the final offer submitted by employees and the employees of such carrier engage in

any work stoppage arising out of the dispute, the carrier whall not participate in any benefits of any agreement between carriers which is designed to prove benefits to such carriers during a work stoppage.

Section 160. Emergency board

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: Provided, however, That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall

investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

Section 162. Authorization of appropriations

There is hereby authorized to be appropriate such sums as may be necessary for expenditure by the Mediation Board in carrying out the provisions of this Act.
(May 20, 1926, ch 347, Title I,

Section 12, 44 Stat. 587; June 21, 1934, ch 691, Section 7, 48 Stat. 1197; April 10, 1936, ch 166, 49 Stat. 1189)

§ 163. Repeal of prior legislation; exception

Title III of the Transportation Act, 1920, and the Act approved July 15, 1913 providing for mediation, conciliation, and arbitration, and all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed,
except that the members, secretary, officers, employees, and agents of the Railroad Labor Board, in offir-e upon the date of the passage of this Act [enacted May 20, 1926], shall receive their salaries for a period of 30 days from such date, in the same manner as though this Act had not been passed.
(May 20, 1926, ch 347, Title I, § 14, 44 Stat. 587; April 10, 1936, ch 166, 49 Stat. 1189.)

§ 181. Application of 45 USCS §§ 151, 152, 154-163 to carriers by air

All of the provisions of Title I of this Act [45 USCS §§ 151-163], except the provisions of section 3 thereof [45 USCS § 153], are extended to and shall cover every common carrier by air engaged in

interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.
(May 20, 1926, ch 347, Title 11, § 201, as added April 10, 1936, ch 166, 49 Stat. 1189.)

CODE OF FEDERAL REGULATIONS

National Mediation Board, 29 CFR Parts 1201-1208.
Public observation of National Meditation Board meetings, 29 CFR Part 1209.

§ 182. Duties, penalties, benefits, and privileges

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of Title I of this Act [45 USCS §§ 151-163], except section 3 thereof [45 USCS §153], shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically

included within the definition of "carrier" and "employee", respectively, in section 1 thereof [45 USCS §151].

Section 183. Disputes within jurisdiction of Mediation Board

The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the
National Mediation Board and the jurisdiction of said Mediation Board is extended to any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to an adjustment board, as hereinafter provided, ,and not adjusted in conference between the parties, or where conferences are refused.

The National Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

The services of the Mediation Board may be invoked in a case under this title [45 USCS Sections 181, et seq.] in the same manner and to the

same extent as are the disputes covered by section 5 of Title I of this Act [45 USCS Section 155]. (May 20, 1926, ch 347, Title II, Section 203, as added April 10, 1936, ch 166, 49 Stat. 1189)

§ 184. System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act [enacted April 10, 1936] before the National Labor Relations Board, shall be handled in the usual up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by of the parties or by either party to an appropriate adjustment board, as hereinafter provided with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every

carrier and of its employees, acting through their representatives selected in accordance with the provisions of this title [45 USCS §§181 et seq.] to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, Title I, of this Act [45 USCS Section 153].

Such boards of adjustment may be established by agreement between employees and carriers either on an individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provision of this title [45 USCS Sections 181 et seq.] from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similar limited jurisdiction. (May 20, 1926, ch 347, Title II Section 204, as added April 10, 1936, ch 166, 49 Sat. 1189.)

Section 185.

National Air Transport Adjustment Board

When in the judgment of the National Mediation Board, it shall be necessary to have a permanent national board of adjustment in order to provide prompt and orderly settlement of disputes between said carriers by air, or any of them, and its or their employees, growing out of grievances or out of the interpretation or application of agreements between said carriers by air or any of them, and any class or classes of its or their employees, covering rates of pay, rules, or working conditions, the National Mediation Board is hereby empowered and directed, by its order duly made, published, and served, to direct the said carriers by air and such labor organizations of their employees, national in scope, as have been or may be recognized in accordance with the provisions of this Act, to select and designate four representatives who shall constitute a board which shall be known As the "National Air Transport Adjustment Board." Two members of said National Air Transport Board shall be selected by said carriers by air and two members by the said labor organizations of the employees,

within thirty days after the date of the order of the National Mediation Board, in the manner and by the procedure prescribed by Title I of this Act [45 USCS §§ 151 et seq.] for the selection and designation of members of the National Railroad Adjustment Board. The National Air Transport Adjustment Board shall meet within forty days after the date of the order of the National Mediation Board directing the selection and designation of its members and shall organize and adopt rules for conducting its proceeding, in the manner prescribed in section 3 of Title I of this Act [45 USCS § 1531. Vamcies in membership or office shall be Mled, members shall be appointed in caw of failure of the carriers or of labor organizations of the employees to select and designate representatives, members of the National Air Transport Adjustment Board shall be compensated, hearings shall be held, findings and awards made, stated, served, and enforced, and the number and compensation of any necassistants shall be determined and the compensation of such employees shall be paid, all in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by section 3 of Title I of

this Act [45 USCS § 153]. The powers and duties prescribed and established by the provisions of section 3 of Title I of this Act [45 USCS §153] with reference to the National Railroad Adjustment Board and the several divisions thereof are hereby conferred upon and shall be exercised and performed in like manner and to the same extent by the said National Air Transport Adjustment Board, not exceeding, however, the jurisdiction conferred upon said National Air Transport Adjustment Board by the provisions of this title [45 USCS §§ 181 et seq.]. From and after the organization of the National Air Transport Adjustment Board, if any system, group, or regional board of adjustment established by any carrier or carriers by air and any class or classes of its or their employees is not satisfactory to either party thereto, the said party, upon ninety days' notice to the other party, may elect to come under the jurisdiction of the National Air Transport Adjustment Board.
(May 20, 1926, ch 347, Title II, § 205, as added April 10, 1936, ch 166, 49 Stat. 1190.)

Section 187. Separability of provisions

If any provision of this title [45 USCS Section 181 et seq.] or application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.
(May 20, 1926, ch 347, Title II, Section 207, as added April 10, 1936, ch 166, 49 Stat. 1191)

§ 188. Authorization of appropriations

There is hereby authorized to be appropriated such sums as may be necessary for expenditure by the Mediation Board in carrying out the provisions
of this Act.
(May 20, 1926, ch 347, Title II, § 208, as added April 10, 1936, ch 166, 49 Stat. 1191.)